UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RAI STRATEGIC HOLDINGS, INC. and R.J. REYNOLDS VAPOR COMPANY, Plaintiffs and Counterclaim Defendants, v. ALTRIA CLIENT SERVICES LLC; PHILIP MORRIS USA INC.; and PHILIP MORRIS PRODUCTS S.A., Defendants and Counterclaim Plaintiffs.	Case No. 1:20-cv-00393-LO-TCB

[PROPOSED] ORDER GRANTING REYNOLDS'S MOTION TO SEAL

This matter is before the Court on the motion filed by RAI Strategic Holdings, Inc. and R.J. Reynolds Vapor Company (collectively, "Reynolds") to file under seal trial exhibits that contain confidential information of Reynolds and of third parties, pursuant to Local Civil Rule 5(C) and 5(H).

Before this Court may seal documents, it must consider both substantive and procedural requirements. Substantively, the Court must determine the nature of the information and the public's right to access. *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988). Although "the Supreme Court has not addressed whether the First Amendment's right of access extends to civil trials or other aspects of civil cases . . . , the Fourth Circuit[ ] ha[s] recognized that the First Amendment right of access extends to civil trials and some civil filings." *Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011). Even so, public access to civil trial records "is not absolute," and restrictions can be justified by concerns that such records

"might . . . become a vehicle for improper purposes," such as where the records serve "as sources of business information that might harm a litigant's competitive standing." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). In particular, a corporation's "strong interest in preserving the confidentiality of its proprietary and trade-secret information . . . may justify partial sealing of court records." *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014); *see also Apple, Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1218, 1228-29 (Fed. Cir. 2013).

The common law "presumes a right of access to all judicial records and documents." *Level 3 Commc'ns, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 577 (E.D. Va. 2009). However, the presumption "can be rebutted if countervailing interests heavily outweigh the public interests in access." *Id.* (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)). For example, "courts have refused to permit their files to serve . . . as sources of business information that might harm a litigant's competitive standing" and have sealed such information from the public. *Id.* (quoting *Nixon*, 435 U.S. at 598). Courts consider whether the movant has borne its "burden of showing some significant interest that outweighs the presumption." *Id.* (quoting *Rushford*, 846 F.2d at 253). The First Amendment's right of public access is "much stronger than the guarantee provided by the common law." *Id.* Accordingly, this Court has held that the First Amendment guarantee of public access "applies where efforts are made to seal documents offered into evidence before a court in the course of a public jury trial." *Id.* at 579. In determining whether "a particular document sought to be sealed is subject to the First Amendment's presumptive right of access, the court must weigh and balance competing interests." *Id.* The presumption may be overcome "by an overriding interest based on findings that closure is essential to preserve higher values." *Id.* at 580. Courts have recognized that the

presumption may be overcome where "confidential commercial information, such as a trade secret," must be protected. *Id.* at 582.

Procedurally, the Court must: "(1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives." *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (citing *Stone*, 855 F.2d at 181). Public notice can be satisfied through the docketing of a party's motion to seal. *Stone*, 855 F.2d at 181 (explaining that to satisfy the notice requirement courts must either "notify persons present in the courtroom of the request" or "docket it 'reasonably in advance of deciding the issue'"); *Adams v. Object Innovation, Inc.*, No. 11-cv-00272-REP-DWD, 2011 WL 7042224, at *4 (E.D. Va. Dec. 5, 2011), *report & recommendation adopted*, 2012 WL 135428 (E.D. Va. Jan. 17, 2012).

Upon consideration of Reynolds's motion to seal and its memorandum in support thereof, the Court hereby **FINDS** as follows:

1. Reynolds's request satisfies the substantive requirements. Its request is narrowly tailored. Although the parties list over two thousand proposed trial exhibits, Reynolds seeks to seal and redact from the public record only information designated by Reynolds and non-parties as confidential. The information sought to be sealed includes Reynolds's PMTAs for its VUSE products, regulatory strategy, CAD files and source code, licensing agreements with non-parties, technical documents from third-parties, and non-public financial information, including forecasts, costs analyses, internal plans regarding distribution and marketing, and financial information for individual VUSE product lines. These materials fall within the Protective Order and Reynolds has maintained the confidentiality of these documents.

2. Each of these documents serve "as sources of business information that might harm [Reynolds's] competitive standing." *Nixon*, 435 U.S. at 598. Here, Reynolds's "strong interest in preserving the confidentiality of its proprietary and trade-secret information . . . justif[ies] partial sealing of court records." *Doe*, 749 F.3d at 269; *see also Apple, Inc.*, 727 F.3d at 1218, 1228-29. Moreover, the exhibits to be sealed are not necessary for the public to understand what will happen at trial. This is a patent infringement case that does not turn on the data in the form submitted to FDA, so the PMTAs "will shed no light" on the issues at trial. *In re Incretin-Based Therapies Prod. Liab. Litig.*, 2015 WL 11658712, at *3. The PMTAs also disclose the composition of the e-liquid in the Vuse products which is a trade secret, and in addition to the product-related details, the structure and content of Reynolds's PMTA submissions are also confidential and competitively sensitive, because they provide insight into Reynolds's decisions and strategy regarding scientific content, tests, and data and the organization of this information as provided in the PMTAs. Witnesses, including expert witnesses, may properly describe facts also found in the PMTAs, or even use images derived from the PMTAs, without disclosing the regulatory submissions themselves. These exhibits contain innumerable "details that w[ill] not [be] referenced during testimony or by counsel during opening statements or closing arguments." *Syngenta Crop Prot., LLC v. Willowood, LLC*, No. 1:15-CV-274, 2017 WL 6001818, at *6 (M.D.N.C. Dec. 4, 2017); *see also Airboss Rubber Compounding (NC), Inc. v. Kardoes Rubber Co.*, No. 1:12-CV-352, 2013 WL 12380267, at *1 (M.D.N.C. July 23, 2013) (granting motion to seal "certain business and proprietary information which is not ordinarily public" because "[t]he competitive and financial interests of the parties would be harmed by public disclosure").

The damages expert witnesses may rely on certain terms from the third-party agreement with Fontem and the non-party termination with Nicoventures in stating their opinions, but that

does not justify disclosing the entire agreements and related documents, or the underlying negotiations, to the public at large. *See, e.g.*, *LifeNet Health v. LifeCell Corp.*, No. 2:13cv486, 2015 WL 12517430, at *4 (E.D. Va. Feb. 12, 2015) (holding that the defendant's "interest in protecting its and third-parties confidential commercial information is significant enough to outweigh the First Amendment right of access in this case"); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2018 WL 6795835, at *1 (E.D. Va. Nov. 1, 2018) (granting motion to seal agreement including "detailed licensing terms, covenants regarding the enforceability of patents, and an express agreement that the parties would keep its terms confidential").

Although certain testimony regarding the technical drawings, schematics, and invoices of Reynolds's third party suppliers may be relevant to issues at trial, disclosing full copies of these documents to the public would harm the third parties and Reynolds in future business dealings and would provide an unfair advantage to competitors by giving them the benefit of the research and development of the third parties and Reynolds without the same investment. At least some of the third-party supplier documents are subject to contractual confidentiality obligations.

Similarly, the financial projections, costs analyses, and reference to Reynolds's future business plans will likely inform some part of the damages experts' testimony, but given the nature of the "hypothetical negotiation" analysis for patent damages, their ultimate opinions on royalty rates and base amounts will be supported largely by historical financial and cost information, and other evidence sufficient for the public "to evaluate the fairness of the proceedings and of the result." *Syngenta*, 2017 WL 6001818, at *6. The minimal interest that the public may have in this specific information is heavily outweighed by the clear and substantial risk of competitive and financial harm to Reynolds if the information is revealed. *See id.* ("The Court finds that Syngenta

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